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Freedom of Speech and the Press

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Frankel v. Roberts[503]
(decided April 2, 1991)

The petitioners, Robert Frankel and Troy Yancey, attorneys employed by the Legal Aid Society, filed an article 78 proceeding to prohibit respondent, Justice George Roberts, from enforcing his ruling requiring them to remove from their lapels political buttons which stated "Ready to Strike." The petitioners challenged the justice's ruling as violative of their free exercise of speech protected under the federal[504] and state[505] constitutions. The court granted the petitioners' application and held that "the mere act of wearing a button which has some expression of political import . . . is an exercise of speech protected under" the United States and New York State Constitutions.[506]

The subject of this petition involved an incident that took place in part 30 of the New York Supreme Court, Criminal Term "where only arraignments, initial plea bargaining and motion practice were conducted."[507] No jury trials were conducted there. The petitioners were ordered to remove their "Ready to Strike" buttons. Their refusal to comply with Justice Roberts' order led to their removal as counsel for their clients, who were criminal defendants. Justice Roberts announced that he would refuse to receive Legal Aid attorneys as counsel if they continued to wear the buttons. He also stated that, as of the next day, he would hold any such attorney in contempt.

The court began its analysis by comparing *LaRocca v. Lake*[508]

503. 165 A.D.2d 382, 567 N.Y.S.2d 1018 (1st Dep't), *appeal dismissed*, 78 N.Y.2d 1071, 582 N.E.2d 603, 576 N.Y.S.2d 220 (1991).

504. U.S. CONST. amend. I.

505. N.Y. CONST. art. I, § 8.

506. *Frankel*, 165 A.D.2d at 384, 567 N.Y.S.2d at 1019-20.

507. *Id.* at 383, 567 N.Y.S.2d at 1019.

508. 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976).

to the present case. In *LaRocca*, the court of appeals found that a priest-lawyer wearing his clerical collar during a jury trial could create an atmosphere where the jury "might ascribe a greater degree of veracity and personal commitment to the rightness of his client's cause. On the other hand, religious prejudices, often insidious and unstated, might spill over from the lawyer-cleric to the defendant."[509] The court distinguished *LaRocca* from the present case because Justice Roberts' court had "no jury to be impressed favorably or unfavorably."[510]

The court then affirmed that the principles found in the First Amendment of the United States Constitution and article 1, section 8 of the New York State Constitution unquestionably extend to the courtroom. "Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question . . . ."[511] Therefore, "'the crucial question [became] whether the manner of expression [was] basically incompatible with the normal activity of a particular place at a particular time.'"[512] The court concluded that:

> [W]earing a button with a political slogan would be entitled to the same protection that would be afforded if the button were worn in any other public place. This manner of expression was not basically incompatible with the normal activity and operation of this courtroom devoid of jurors or witnesses.[513]

The court then addressed the petitioners' contention that the restricted speech was content based. The petitioners claimed that Justice Roberts had told them that he would not take issue with "Save the Whales" buttons. Therefore, they contended that "[w]hat obviously concerned him was the content of the button

509. *Frankel*, 165 A.D.2d at 384, 567 N.Y.S.2d at 1019.

510. *Id.*

511. *Id.* at 384, 567 N.Y.S.2d at 1020 (quoting United States v. Grace, 461 U.S. 171, 184-85 (1983) (Marshall, J., concurring in part and dissenting in part)).

512. *Id.* at 385, 567 N.Y.S.2d at 1020 (quoting

itself which he felt would be 'unsettling' to the client."[514]

The court noted that the New York Court of Appeals, in *In re Von Wiegen*,[515] applied a different standard when reviewing an official attempt to limit content of speech than it applies when reviewing the time, place and manner of speech: "'Time, place and manner restrictions are valid if reasonable and rationally related to legitimate State interests. Content or subject matter may be regulated only if substantial State interests are involved and then the regulation may go no further than necessary to serve that interest.'"[516] It should be noted, however, that *Von Wiegen* concerned commercial speech. The court in *Von Wiegen* was evaluating the conduct of an attorney involved in national soliciting. The *Von Wiegen* court expressly stated that while commercial speech is entitled to First Amendment protection, "[i]t is subject to lesser degree of protection than other traditionally protected types of speech."[517] Thus, the standard of review employed when evaluating a restriction of commercial speech is different than that used when evaluating other protected speech.

Though it referred to the mid-level test enunciated in *Von Wiegen* for commercial speech, the court nevertheless applied the compelling state interest test to the present case. The New York Court of Appeals applied this test in *Town of Islip v. Caviglia*[518] and it is the applicable standard of review for governmental restrictions on non-commercial content-based speech. The court of appeals stated:

> Generally speaking, if the regulation is content-based it is presumptively invalid and therefore subject to strict scrutiny. However, content-neutral restrictions, those justified without reference to the content of the regulated speech and relating only to the time, place, and manner of expression, are valid if the governmental interest to be achieved outweighs the resulting

514. *Id.*

515. 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985).

516. *Frankel*, 165 A.D.2d at 385, 567 N.Y.S.2d at 1020 (quoting *Von Wiegen*, 63 N.Y.2d at 171, 470 N.E.2d at 842, 481 N.Y.S.2d at 44).

517. *Von Wiegen*, 63 N.Y.2d at 170, 470 N.E.2d at 842, 481 N.Y.S.2d at 44.

interference with free expression.[519]

Applying the compelling state interest level of scrutiny to the content based restriction at issue in *Frankel*, the court found that "although Justice Roberts termed the button 'unsettling' to defendants [sic] clients, he made no inquiry of the client, petitioner Smith, and thereafter received counsel for petitioner Smith despite his objection."[520] Indeed, in light of the fact that the button was worn in a non-jury court room, the appellate court found that there was no significant governmental interest for restricting the speech. The court stated that "the record before us does not demonstrate a 'compelling' state interest necessitating the Justice's complete ban on the mere display of the small button with a particular political message."[521]

In Justice Wallach's concurring opinion, the order of the trial court rested entirely on an arbitrary exercise of judicial power. The assumption that a client's morale would necessarily be shaken once the message of the button was perceived was found to be without merit. Justice Wallach demonstrated this point by referring to the order of the trial court. The order did not enjoin future or address past disclosure by counsel to the client of the button's message, nor did this message cause any turmoil inside or outside the courtroom.[522]

Justice Kupferman, in a dissenting opinion, criticized the majority for assuming that "the Judge was concerned with the offense to his sensibilities rather than with the due administration of justice."[523] Justice Kupferman maintained that "the Judge must have decorum in the court, and must have counsel who are in the courtroom for Court business."[524]

The United States Supreme Court, in *Ward v. Rock against Racism*,[525] set forth the applicable standard of review for content

518. 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).
519. *Id.* at 556-57, 540 N.E.2d at 221, 542 N.Y.S.2d at 145.
520. *Frankel*, 165 A.D.2d. at 386, 567 N.Y.S.2d at 1021.
521. *Id.*
522. *Id.* at 389, 567 N.Y.S.2d at 1022-23. (Wallach, J., concurring).
523. *Id.* at 390, 567 N.Y.S.2d at 1023 (Kupferman, J., dissenting in part).
524. *Id.* (Kupferman, J., dissenting in part).
525. 491 U.S. 781 (1989).

neutral governmental restrictions on protected speech. Justice Kennedy, writing for the majority, stated that a regulation that seeks to limit protected speech, not because the government does not like the message, but rather for other reasons such as time, place and manner, is evaluated under a type of mid-level scrutiny. This test requires that the regulation "be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[526] In 1991, the United States Supreme Court reaffirmed that standard of review in the case of *Simon & Schuster v. Members of the New York State Crime Victims Board*.[527]

Thus, the United States Supreme Court, like the New York Court of Appeals, applies the strict scrutiny standard of review to regulations that are content based.

The recognized principle of federalism dictates that state courts are bound by Supreme Court decisions when defining federal constitutional rights. These decisions establish a minimum standard which the states may not fall below. They may, however, surpass it.[528] In *Frankel*, although the court *articulated* a standard of review that falls below the minimum federal constitutional standard and below the standard applied by the court of appeals, it nonetheless *applied* the correct standard of review when evaluating the petitioners' claim.

526. *Id.* at 798.

527. 112 S. Ct. 501 (1991).

528. *Caviglia*, 73 N.Y.2d at 556, 540 N.E.2d at 221, 542 N.Y.S.2d at 145.